No. 471

In the Supreme Court of the United States

OCTOBER TERM, 1958

ANTHONY M. PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

JOSEPH F. GOETTEN,
LAWRENCE K. BAILEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 13-18) is reported at 258 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1958 (R. 439a),[1] and a petition for rehearing was denied on September 25, 1958 (R. 453a). The petition for a writ of certiorari was filed on October 24, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] R. references are to the printed appendix to the petitioner's brief in the Court of Appeals, as supplemented by the proceedings in that Court.

QUESTION PRESENTED

Whether it was error to refuse to allow defense counsel to inspect and use for cross-examination a memorandum written by a Government agent who had conferred with a witness for the prosecution when that memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said.

STATUTE INVOLVED

The Act of September 2, 1957 (71 Stat. 595, 18 U.S.C., Supp. V, 3500) provides:

Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testi-

mony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the

court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

On February 3, 1958, a judgment of conviction was entered against the petitioner for wilful, attempted income tax evasion for the years 1950, 1951 and 1952. He had been convicted after a 26-day trial before a jury in the Southern District of New York. Judge Dimock sentenced the petitioner to three concurrent terms of 2 years imprisonment. He is presently free on $5,000 bail. (R. 4a-5a, 10a-11a.)

The evidence showed that the petitioner understated his income and taxes for the years 1948 through 1952. The evasion for the years 1950, 1951 and 1952, involved $55,487.18 (over 54%) in income (Ex. 652),

and in excess of $30,000 in taxes.[2] All of the unreported income discovered in this case was derived from the petitioner's operations in the stock market (Ex. 646).

Some of the stock and brokerage accounts were held or maintained in the names of the petitioner's mother (Exs. 29, 38-42, 53-59, 71-76, 95-105, 129-132, 152 and 153), his niece (Exs. 20, 298), and a friend of long standing and for some time an employee (Exs. 646, 651; Tr. 119-120).[3] None of the nominees received any dividends or capital gains from these transactions (Tr. 74, 110-115, 119-123). During the years involved the petitioner received $3,815.27 in dividends and $7,608.54 in taxable capital gains (this figure includes only 50% of long-term capital gains) on stock carried in his mother's name (Exs. 650, 651; Tr. 1326-1328). During all of these years, the petitioner took a personal exemption on his tax returns for his mother's support, and disclosed none of "her" income on his tax returns (Exs. 1-5).

The accounting firm of Arthur R. Sanfilippo & Company kept books pertaining to the petitioner's real estate holdings and prepared his state and federal tax returns. Arthur R. Sanfilippo, a certified public accountant and principal partner in the firm, was the petitioner's brother-in-law. Through the

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[2] Government exhibits referred to herein have been lodged with this Court.

[3] Tr. refers to the reporter's transcript of the trial, on file with this Court.

years Sanfilippo had acted as petitioner's tax consultant, advising him that capital gains and dividends were taxable, and discussing tax matters each year before the returns were prepared (R. 25a-27a).

On July 16, 1956, Sanfilippo gave a statement to the Internal Revenue Service. On August 23, 1956, he read and signed the transcription of the statement which he had given earlier. At the same time, to correct errors made in the July 16, 1956, statement, Sanfilippo executed an affidavit. (Pet. 14; Tr. 784, 785.) Some hours after the meeting was over, the agents made a memorandum of what took place at this August 23, 1956, meeting (See Court's Ex. 2, pp. 1, 4).

On cross-examination of the witness Sanfilippo, the petitioner demanded and was given (1) the minutes of the witness' testimony before the grand jury, (2) a copy of the witness' testimony under oath given to the Internal Revenue Service on July 16, 1956,[4] and (3) the witness' August 23, 1956, affidavit. The trial judge refused to turn over to the petitioner the agent's memorandum of the August 23, 1956, meeting. Instead the court ordered the memorandum sealed as Court's Exhibit 2; the exhibit was considered by the Court of Appeals in reaching its decision, and is now certified to this Court.

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[4] Sanfilippo had already provided the petitioner with his copy of the July 16, 1956, statement (Tr. 993).

ARGUMENT

The petitioner contends that he was entitled to inspect and use on cross-examination the memorandum made by the agents of what took place on August 23, 1956, at the meeting with the witness Sanfilippo. Petitioner first argues (Pet. 10) that the provisions of 18 U.S.C. 3500, *supra*, pp. 2-4, required that the agent's memorandum be turned over to him for inspection and for purposes of cross-examination, and that the court below too narrowly construed the statutory provision which requires that the statement be a "substantially verbatim recital" and "recorded contemporaneously".

Following this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, Congress enacted the statute which became 18 U.S.C. 3500, to provide the procedure and establish the rules and conditions under which trial courts should direct the production of statements or reports of government witnesses (Pet. 17). Precise standards were set up in the statute defining the following kinds of statements or reports which must be produced: (1) written statements, signed, adopted or approved by the witness; (2) stenographic, mechanical, electrical or other recording, and transcriptions thereof which (a) must be a substantially verbatim recital of a witness' oral statement, and in addition (b) must be recorded contemporaneously with the making of the oral statement.

It is not disputed that the agent's memorandum (Court Ex. 2) was not signed, approved or otherwise adopted by the witness. As the court below said (Pet. 15), it is quite apparent from the record that the mem-

orandum was made from memory; that it was merely a summary of the agent's recollection, and that it does not appear that the memorandum was a transcript of notes made at the interview. As is apparent from the face of the memorandum, it does not purport to be a transcript or even a complete summary of what was said by the witness during the meeting; and it was not prepared until some hours after the conference. (Court Ex. 2, pp. 1, 4.) It was thus not a substantially verbatim recital of what the witness said at the meeting and it was not recorded contemporaneously with the making of the oral statement. The court below was correct in finding that the agent's memorandum did not meet either of the two standards provided by the statute for production and use in cross-examination of a "statement" of a witness.

The petitioner further contends (Pet. 10) that even if the memorandum does not meet the requirements of 18 U.S.C. 3500, nevertheless the latter statute is not the exclusive standard governing inspection of alleged "statements" (Pet. 9), and that the petitioner has such a right of inspection under the principles laid down in *Jencks* v. *United States*, 353 U.S. 657. This Court, in *Jencks*, was passing upon a specific case involving written reports, and records of oral reports, made by persons whose duty it was to make reports to the Government. Since the matter was not in issue, it was assumed for the purposes of that case that the records of the oral reports represented the actual statements given by the witnesses. Moreover, it seems inferable that the F.B.I. record-

ing was in fact contemporaneous with the making of the oral statements. *United States* v. *Lev*, 258 F. 2d 9, 13, fn. 1 (C.A. 2), pending on petition for writ of certiorari, No. 435. This Court thus had no occasion in *Jencks* to define precisely what constituted an oral or written report or statement of a witness, and it did not do so.

Contrary to the petitioner's allegation (Pet. 10-11), there is no conflict between the decision in this case and that rendered by the Court of Appeals for the Sixth Circuit in *Bergman* v. *United States*, 253 F. 2d 933 (Pet. 19-22). The Sixth Circuit in a footnote (Pet. 21) made only passing reference to the issue and in doing so assumed that the statement of that witness came within the standards set up by 18 U.S.C. 3500.

Finally, the petitioner contends (Pet. 11) that failure to furnish him with the agent's memorandum deprived him of due process of law under the Fifth Amendment to the Constitution. The petitioner does not show how failure to provide a defendant with a Government agent's memorandum of the agent's recollection from memory of what had taken place at a meeting with the witness could deprive petitioner of any constitutional right. The memorandum is hearsay as to the witness. There is no recognized rule of evidence under which the petitioner would be entitled as of right to such a document, consisting only of notes or a memorandum made by a third party which the witness has not adopted as his own statement or which the evidence does not show to be in fact his own statement.

As to reports which this Court held in *Jencks* the defendant was entitled to have, the Court's holding

was not based on constitutional considerations. Rather, it announced a procedural and evidentiary rule to be followed in the trial of criminal cases in the federal courts. *United States* v. *Gandia*, 255 F. 2d 454, 455 (C.A. 2); *United States* v. *Spangelet*, 258 F. 2d 338 (C.A. 2); *Scales* v. *United States*, decided October 6, 1958 (C.A. 4), pending on petition for writ of certiorari, No. 488.

With respect to such reports or statements used in cross-examination, this Court has emphasized the value for impeaching purposes of "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment * * *." *Jencks* v. *United States*, 353 U.S. 657, 667. If the witness is to be held accountable for a statement's omissions, contrasts in emphasis and order of treatment alleged to be different from that of his testimony given from the witness stand, justice requires that the statement in fact be his own. To allow a witness' testimony to be tested on the basis of a memorandum prepared by a Government agent which is not in fact the statement of the witness would introduce an extraneous element into cross-examination, which cannot be considered necessary in order to assure a fair trial. If such a change in trial procedure is to be made, we believe Congress should make it. This it deliberately refrained from doing in the so-called *Jencks* law. 18 U.S.C. 3500.[5]

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[5] We have discussed this aspect of the legislative history of the law at pages 24 to 27 of the brief in opposition in *Lev* v. *United States*, No. 435, this Term.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
LAWRENCE K. BAILEY,
Attorneys.

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